

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, CR 13-00607

-against-

U.S. Courthouse  
Central Islip, NY

PHILLIP KENNER, et al.,

November 18, 2014  
11:00 a.m.

Defendant.

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TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE JOSEPH F. BIANCO  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: LORETTA E. LYNCH  
United States Attorney  
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Assistant U.S. Attorney

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Proceedings recorded by mechanical stenography; transcript  
produced by computer transcription.

1 (Case called.)

2 MR. MISKIEWICZ: Good morning, your Honor.

3 James Miskiewicz for the United States.

4 MR. HALEY: Good morning, your Honor. Richard  
5 D. Haley pursuant to CJA, and my client Mr. Kenner.

6 THE COURT: This is a detention hearing.

7 Are both sides ready to proceed?

8 MR. MISKIEWICZ: Yes, your Honor.

9 MR. HALEY: Yes, your Honor.

10 THE COURT: I'm considering the issue de novo  
11 because of the fact that the prior detention order was  
12 without prejudice to renewal and the defendant had a bail  
13 package and wanted to make an application, so given the  
14 posture I'll let the Government go first. Obviously I  
15 received the initial letter way back in November of 2013,  
16 as well as the supplemental letter in response to  
17 Mr. Haley's letter, so I've reviewed those and you can  
18 highlight anything you wish.

19 MR. MISKIEWICZ: Then in that case, your Honor,  
20 we would only incorporate by reference what we said  
21 earlier in the prior two submissions -- may I speak from  
22 the podium?

23 THE COURT: Sure.

24 MR. MISKIEWICZ: And I would only supplement  
25 what we've said with a couple items that we have not cited

1 to before. So this will be new material.

2 In that regard I have five Government Exhibits  
3 I'd like to hand up to the Court. I've already given  
4 Mr. Haley copies of each.

5 If I may, your Honor, I've highlighted the most  
6 relevant portions just to -- just for expediency to move  
7 things along quickly. If I may --

8 THE COURT: Sure.

9 MR. MISKIEWICZ: If I may just walk the Court  
10 through what I believe is pertinent regarding the bail.

11 In essence, your Honor, one of the two most  
12 basic questions a defendant should be able to answer  
13 without equivocation or confusion -- one last item if I  
14 may hand this up, your Honor, the pretrial service report  
15 from Arizona. I didn't mark this as an exhibit. I  
16 suppose it would be a Court's exhibit.

17 At the time of his arrest approximately a year  
18 ago, Mr. Kenner was asked a fairly standard question,  
19 where do you live. He was also asked questions what he  
20 owned. Those are two questions any defendant should be  
21 able to answer without any sort of confusion in order to  
22 give any court some sense of security about releasing that  
23 individual on bail. And in pretrial service he indicated  
24 that he lived at 10705 East Cactus Road, Scottsdale,  
25 Arizona. He claimed that he was at that address since

1 2001, approximately 12 years at that point.

2 Well, the defendant has said various things at  
3 various times about his place of residence. In  
4 Government's 1, this is -- this was a deposition taken in  
5 the part of arbitration proceedings, also the same  
6 arbitration proceedings that we cited to in our last  
7 submission on bail regarding how this alleged forgery  
8 issue came to light. And if you would look at the second  
9 page there, Government's Exhibit 1, he's asked, and this  
10 is in August of 2010, so it would have been, he should  
11 have been answering it consistent what he called pretrial  
12 services but instead of saying he lived at East Cactus  
13 Road he claims to have been living at a different address  
14 in a different state, 200 Hoover Avenue, Nevada.

15 Moreover, he's asked in the deposition is that  
16 your property or is it somebody else's, or are you renting  
17 it. He says he's renting it. When he's asked how does he  
18 pay for it, he says he's borrowing the money and gives a  
19 name of a realty company he's paying rent to, Smart Move.  
20 That is August 2010.

21 In Government's Exhibit 2, the same proceeding  
22 or same litigation. He's asked, though, and this is at  
23 the second deposition, he's asked once again, and by the  
24 way this was a deposition taken telephonically so the  
25 attorney, Ms. Swift is questioning to just understanding

1 where the defendant is calling in from and he says he's  
2 calling in from Las Vegas, gives 200 Hoover Avenue, Las  
3 Vegas address.

4 Then an interesting thing happens. He was asked  
5 the same questions he was asked a few months earlier  
6 whether it is his home or if he rents. He says no, it's a  
7 friend of mine who owns this home and names an individual  
8 Rebecca Baumgartner.

9 Do you pay rent to Ms. Baumgartner?

10 And he says no.

11 He's asked are you her guest?

12 Yes, I am.

13 Are you living in that house?

14 Yes, I am.

15 Then the questioner goes on to remind him a few  
16 months earlier he was renting this house from a company  
17 called Smart Move Realty, allegedly.

18 The questioner, starting at page 62, reads from  
19 the prior transcript which is now part of Government's  
20 Exhibit 1, and then at page 83 he's asked, now, I'm asking  
21 you who is Smart Move Realty?

22 I don't know.

23 But you testified on August 11th that you are  
24 making a rent payment for the 200 Hoover Avenue property,  
25 to Smart Move Realty?

1 I believe just what you just read.

2 Yes. Where did you come up with that name?

3 I had seen that name on a check before.

4 I'm not going to reread the entire transcript,  
5 it's in the record for your Honor to read in detail, but  
6 he never really answers the question. He basically says,  
7 well, I said what I said earlier and I came up with a  
8 name, I think I may have seen it on a check. This is a  
9 question about where do you live. This is not rocket  
10 science.

11 To highlight this was not some mere slip of the  
12 tongue, your Honor, Government's Exhibit 3 is a portion of  
13 a transcript of a deposition of the defendant taken about  
14 a year later, April 28, 2011. The formatting on this is a  
15 little bit different. We got it in what we call text map  
16 format, it's a searchable format, but it is a portion of  
17 the transcript of that deposition. I've included the page  
18 where he identifies who he is.

19 Then about four pages in, it is marked page 29,  
20 he's asked the same questions.

21 What is your current address, and gives the same  
22 answer, 200 Hoover Avenue. This is the one he was renting  
23 but now is a guest there.

24 How long have you been at that current address?

25 Approximately two years.

1           It is entirely inconsistent what he claims to  
2       pretrial services in Arizona 30 some-odd months later. He  
3       said he was there for 12 years. The numbers don't add up.

4           He gives in fact another address two years prior  
5       to the Hoover Street address, 4525 Dean Martin Boulevard,  
6       Las Vegas.

7           How long did you live there?

8           Approximately two years.

9           Then prior to that: Where did you live?

10          Now he says, 10705 East Cactus Road, Scottsdale,  
11       Arizona, which would put his last time at that address at  
12       somewhere around 2007. Again, this predates what he told  
13       pretrial services by about 32 months.

14          It's a simple question: Where do you live?  
15       Can't even give a simple answer or straight answer.

16          Moreover, if you look at Government's Exhibit 4,  
17       your Honor, this is a couple of pages of a Bank of America  
18       bank statement. In the upper right-hand side I've  
19       highlighted the reporting period or the cycle period. It  
20       is August 24, 2010 through September 22, 2010. It would  
21       have been immediately after that very first deposition  
22       that I summarized the one in the arbitration. He's  
23       getting a bank statement in his name at the 10705 East  
24       Cactus Road address, not in Las Vegas, in Scottsdale,  
25       Arizona.

1           Now, by the way in his own name he has nothing,  
2           and maybe that's not particularly relevant since he's  
3           offering nothing by way of a bail package, but what he  
4           says about his ownership of assets is, and in that regard  
5           I would ask that the Court refer back to the very first  
6           exhibit, Government's Exhibit 1, the last page of that  
7           exhibit.

8           He's asked -- this is a portion of the  
9           deposition where he's asked his ownership interest.  
10          Page 33 of the deposition in Government's Exhibit 1. He's  
11          asked.

12                 Question: What about a Guide-Dog LLC?

13                 Answer: What about Guide-Dog LLC?

14                 Question: Do you have an ownership interest in  
15          Guide-Dog LLC?

16                 Answer: I do not.

17                 And he reiterates that. He goes on, and in fact  
18          the ownership interest has been transferred to John  
19          Kaiser, one of the individuals referenced in the  
20          submission by the defense. This is August of 2010.

21                 I've pulled a series of bank statements for  
22          Guide-Dog LLC and they are marked as Government's  
23          Exhibit 5. They begin for the period 8/01/10, in other  
24          words, right at the time of this deposition and they  
25          continue through the beginning of September of 2010, all



1 of that is in Government's Exhibit 5.

2 Guide-Dog LLC is going to the same address,  
3 again several months later he tells a different story,  
4 tells pretrial services in Scottsdale Arizona he's living  
5 there, been there for 12 years. He's getting these  
6 statements at this address. He has claimed at the same  
7 time as this statement that he has no ownership interest  
8 in it and yet if you review just some of the pages, and I  
9 didn't necessarily highlight everything that I thought was  
10 relevant, but if you review here time and time again we  
11 see Phillip Kenner receiving substantial sums of money on  
12 behalf of or through Guide-Dog, LLC and spending  
13 substantial sums of money. In fact he goes through about  
14 \$100,000 in just this one month, the same month he claims  
15 that he has no ownership interest in the company.

16 The third page, 3 of 6, I've just highlighted a  
17 number of references here. They all begin with the  
18 letters INDN as in Nancy, DN, Phillip Kenner, where I've  
19 been advised by the bank means that is a shorthand for  
20 indication, and it is an indication of who was authorizing  
21 the various debits indication.

22 If you look through these exhibits time and time  
23 again it is Phillip Kenner, among others,, again, the  
24 girlfriend or the woman he claims to be a guest of is also  
25 named here. Time and time again it is John Kaiser,

1 Phillip Kenner or Phil Kenner who is spending hundreds of  
2 thousands of dollars via this corporation that he has  
3 sworn in that deposition that very month he does not own.

4 So, in sum, your Honor, this is the thought,  
5 material that we've not specifically referenced earlier,  
6 and I think it is relevant because on the most basic of  
7 questions this man has lied about where he lives, lies  
8 about what he owns, and for that reason he is not a good  
9 risk to be released on any bail but particularly an  
10 unsecured personal recognizance bond.

11 Unless the Court has any questions, I've  
12 concluded my presentation.

13 THE COURT: No, I don't have any questions.

14 Thank you.

15 Go ahead, Mr. Haley.

16 MR. HALEY: Thank you.

17 Your Honor, at the outset I would simply  
18 indicate I have no objection to the introduction of the  
19 exhibits that were offered by the Government for the  
20 Court's consideration. They were presented to the Court  
21 without inquiry. I don't object, so I will make that  
22 clear for purposes of the record.

23 I would also, Judge, like to make clear for  
24 purposes of the record, I did also provide counsel this  
25 morning an exhibit we intend to introduce, dated July 21,

1 2006, entitled Little Isle IV LLC, dated July 21, 2006.

2 If I might approach the bench and have this marked as  
3 Defendant's Exhibit A for purposes of the hearing.

4 THE COURT: Thank you.

5 MR. HALEY: Your Honor, also by way of  
6 introductory remarks, we concede as demonstrated by my  
7 client's prior testimony, that for a two-year period he  
8 lived at a location identified consistently as 200 Hoover  
9 Avenue in Nevada with a girlfriend. At one point there  
10 was a change in realtors which has been referred to by the  
11 Government but we don't deny that for that two-year period  
12 from approximately 2009 through 2011, he resided with a  
13 girlfriend at 200 Hoover Avenue in Nevada.

14 In the pretrial services report he is asked a  
15 question about his residence or domicile. If I may,  
16 Judge, there is clearly as this Court is well aware a  
17 difference between domicile and residence. There is  
18 clearly a difference where you intend to permanently  
19 reside which is known as ones domicile where you get your  
20 mortgage statements, bank statements, driver's license  
21 listed as your domicile or residence or in an area or an  
22 event where you may be living for some short period of  
23 time in some other location. So when asked if the  
24 defendant resided in Arizona for approximately 12 years  
25 and recited at the above noted residence for 10 years,

1 there are references to the East Cactus address. That's  
2 the address they gave to pretrial services because that is  
3 indeed his domicile and residence.

4 It goes on to say the defendant's ex-wife  
5 verified his residential history, purchased the above  
6 noted residence in 2001 while they were married.

7 I would think the Government would have a point  
8 if they were demonstrating to this Court there were a  
9 series of different addresses, that my client was a  
10 vagabond, though he had a permanent residence at the East  
11 Cactus address location, he was living here in one  
12 instance and there in one instance. He was all over the  
13 face of the map but that's not the case.

14 All they have demonstrated to the Court there  
15 was a two-year period where he resided with his girlfriend  
16 at the 200 Hoover Avenue, Nevada, residence.

17 When he was asked in his deposition where he was  
18 physically located at that point in time when deposed he  
19 gave a truthful answer.

20 Judge, let me move on from that point.

21 It is always my practice, your Honor, in  
22 addressing the Court on any issue to my own mind to recite  
23 the law. And I believe that helps the Court, at least  
24 from an analytical standpoint, it certainly helps me from  
25 an analytical standpoint.

1           For purpose of today's detention hearing, your  
2           Honor, I'm relying upon the Second Circuit decision in  
3           United States versus Friedman, 837 F.2d 48, a 1988 Second  
4           Circuit decision that has withstood the test of time and  
5           indeed the principles I would respectfully submit to the  
6           Court as relates to the issue in a detention hearing still  
7           prevail.

8           And I'm not hear, Judge, to read into the record  
9           a principle of law of which the Court is not aware but  
10          once again it really helps me in my analytical approach.

11          The Second Circuit back in 1988 when confronted  
12          with the primary issue that is considered by a district  
13          court in a detention hearing wrote as follows: After a  
14          motion for detention has been filed, the district court  
15          must undertake a two step inquiry, citing United States  
16          versus Shakur. It must first determine by a preponderance  
17          of the evidence that the defendant either has been charged  
18          with one of the crimes enumerated in Section 3124(f), or  
19          that the defendant presents a risk of flight or  
20          obstruction of justice.

21          In Friedman, much like this case, your Honor,  
22          the Second Circuit wrote: In this case the Government  
23          concedes that Friedman was not charged with a crime of  
24          violence within the meaning of 18 U.S.C. 3142(f)(1)(A), or  
25          any other crime enumerated in Section 3142(f)(1). And

1 indeed, Judge, that is the case here. The statutory  
2 presumption does not apply here.

3 Notably, the Court went on to say: However, the  
4 Bail Reform Act does not permit the detention on the basis  
5 of dangerousness on the absence of risk of flight,  
6 obstruction of justice or an indictment for the offenses  
7 enumerated above.

8 The final relevant remark by the Second Circuit,  
9 Judge, because it goes, I think, to the heart of the  
10 Government's presentation here, reads as follows.

11 In other cases concerning risk of flight, we  
12 have required more than evidence of the commission of a  
13 serious crime and the fact of a potentially long sentence  
14 to support a finding of risk of flight.

15 That is the issue before this Court, I submit,  
16 respectfully, an issue of risk of flight, Judge.

17 When the Government spends pages and pages of  
18 argument suggesting to the Court that despite the  
19 presumption of innocence, Mr. Kenner has committed serious  
20 crimes for which upon conviction he faces a minimum term  
21 of -- excuse me, for which upon conviction under the  
22 United States begins his minimum term of imprisonment is  
23 168 months, that argument, Judge, is not the determinative  
24 factor for purposes of this Court rendering a  
25 determination as to whether he should be released on bail

1 pending ultimately a jury determination as to whether or  
2 not the Government had proven those allegations beyond a  
3 reasonable doubt so as to justify a sentence by this Court  
4 that may well result in a very lengthy term of  
5 incarceration. We're not there yet, Judge.

6 Let's talk about risk of flight.

7 In its November 13, 2013, detention letter to  
8 the Court, and I'm highlighting what I believe again to be  
9 the most salient points, the Government writes Kenner  
10 frequently travels to Mexico. That's true. As a matter  
11 of fact, Judge, in 2013, he went to Mexico twice. The  
12 last time he was in Mexico he was there to sign what was  
13 known as a statutory filing in a lawsuit against a person  
14 by the name of Ken Jowdy, who has a very personal  
15 interest, Judge, in the outcome of these proceedings.  
16 Indeed the attorneys here today, Tom Harvey, he attends  
17 most of these reports as Ken Jowdy as to the outcome of  
18 these proceedings. So he did travel to Mexico twice for  
19 purposes of that statutory filing. It was preceded by a  
20 trip to Mexico to meet with his attorneys by way of  
21 initiating that lawsuit.

22 Judge, the Federal Bureau of Investigation is  
23 aware of these facts. They know that lawsuit is filed and  
24 they know the purpose for which Phillip Kenner went to  
25 them on those occasions. On each and every instance

1 Phillip Kenner, my client, where Phillip Kenner my client  
2 went to Mexico, was related to the ongoing civil dispute  
3 between himself and Ken Jowdy. I might add, Judge, it is  
4 that civil dispute that actually in large part is  
5 integrally related to the allegations in this indictment  
6 and quite frankly integrally related to the defense of  
7 this action.

8 THE COURT: So you are saying the Government in  
9 its internal bail letter says he's traveling to Mexico and  
10 at least seven times in 2009, all of those are related to  
11 the civil litigation?

12 MR. HALEY: Yes, sir, every time he went down  
13 there it is related to the civil litigation to Ken Jowdy.

14 THE COURT: Travel in 2004. It goes back to  
15 2004?

16 MR. HALEY: No. May I answer your question?  
17 (Counsel confers with defendant).

18 MR. HALEY: The civil litigation started in  
19 2009.

20 THE COURT: What was the travel back to 2004  
21 then?

22 MR. HALEY: In 2004 he was a business partner  
23 with Ken Jowdy in a entity named as Diamante Cabo San  
24 Lucas. Actually, Judge, there was another business entity  
25 where he was involved with Ken Jowdy in terms of a



1 business relationship and that was also known as Diamante  
2 Del Mar.

3 But in answer to your Honor's question, yes, all  
4 the travels to Mexico throughout that period of time were  
5 related to that relationship with Mr. Jowdy and the  
6 dispute that ultimately developed as a result of that  
7 relationship.

8 Judge, the dispute as relates to Ken Jowdy, is  
9 indeed reflected already in part of the Rule 16 discovery  
10 provided to the defense, and by that I mean, Judge, it  
11 refers to a revolving line of credit wherein that entity,  
12 Little Isle IV, LLC, loaned actually \$7.5 million to Ken  
13 Jowdy to help develop the Diamante Cabo San Lucas  
14 property, Judge, which is a golf resort designed and  
15 constructed by professional athletes to play golf there,  
16 but for professional athletes to play golf.

17 The revolving line of credit, Judge, is one of  
18 the documents that we submitted to the Court by way of our  
19 original submission. Your Honor may recall that when  
20 pressed as to the forgeries allegedly committed by Phillip  
21 Kenner, one of the representations made was that the  
22 revolving line of credit signed by Ken Jowdy was a  
23 forgery. My client submitted an affidavit to that effect,  
24 denied he forged Ken Jowdy's signature and as your Honor  
25 may recall as part of that submission, there's testimony

1 by a Robert Gaudet in an American arbitration proceeding  
2 wherein he affirmed not only his signature as the  
3 attesting witness, but testified quite directly that he  
4 saw Ken Jowdy sign that revolving line of credit. There  
5 is outstanding about \$5.5 million owing on that loan. Ken  
6 Jowdy did repay a portion of it until he reached a point  
7 where the business dispute between himself and Mr. Kenner  
8 reached a point where he simply stopped paying, Judge, and  
9 indeed that is a significant aspect of the lawsuits filed  
10 against Ken Jowdy in Mexico.

11 Judge, to give you some idea as to the nature  
12 and extent of this litigation, my client is not the only  
13 one who has filed lawsuits against Ken Jowdy as relates to  
14 his failure to acknowledge investments or his failure to  
15 pay back money owed by his investors. There are other  
16 John Does actually listed in this indictment who have  
17 brought suit against Ken Jowdy, one of which, Judge,  
18 involves a civil action pending in the state of Delaware  
19 for the books and records of Diamante Cabo San Lucas, and  
20 Mr. Jowdy has engaged high-priced legal counsel to fight  
21 an action which simply asks to see the books and records.

22 Judge, I could perhaps speak for another  
23 15 minutes and that's not my intention, to describe to the  
24 Court the myriad of civil lawsuits that underline this  
25 indictment, civil lawsuits between my client and Ken

1 Jowdy, between Ken Jowdy and my client, civil lawsuit  
2 involving him and Kaiser and others tangentially related  
3 to the underlying indictment.

4 Let me move on from that point, Judge, but I  
5 wanted to address that claim that my client's traveling to  
6 Mexico for illicit purposes, that's what they are trying  
7 to imply, it's not a crime to travel to Mexico. Also I  
8 said a moment ago all of his travel relates to his  
9 business relationships with Ken Jowdy.

10 With respect to the Government's risk of flight  
11 aspect, to his detention letter, it reads every -- each  
12 and every prior instance involves Kenner's lawsuit versus  
13 Jowdy -- excuse me.

14 The next argument they make is Kenner has  
15 obtained Mexican citizenship and has a Mexican passport.  
16 I don't know how to answer that to say it is simply  
17 untrue. He does not have a Mexican passport and he has  
18 not obtained Mexican citizenship. We believe the source  
19 of that comes from two individuals, John Kaiser and Bryan  
20 Berard who is Ken Jowdy, if you will, part of a cabal,  
21 that have a personal interest in the outcome of this case  
22 and indeed whereas John Kaiser was once a business partner  
23 with Phillip Kenner, is no longer a business partner with  
24 Phillip Kenner, and is indeed employed by Ken Jowdy,  
25 indeed as best we know resides more often than not at Ken

1 Jowdy's property at Diamante Cabo San Lucas in Mexico than  
2 he does in East Setauket.

3 Your Honor, as relates to that allegation that  
4 he has a Mexican passport, Mexican citizenship, I would  
5 put the Government to its proof in that regard as a  
6 proffer, but I would respectfully suggest to the Court,  
7 the Court should require more than an unsubstantiated  
8 allegation as relates to that particular matter.

9 Your Honor, my client resides at the East Cactus  
10 Road address. He resides there with his current  
11 girlfriend. His wife lives approximately five miles away.  
12 She lives with his two children, a son aged 12, a daughter  
13 aged 15. He has a close relationship to his ex-wife,  
14 close relationship with his children. Indeed, Judge,  
15 throughout the voluminous amount of Rule 16 discovery, at  
16 one point I listened to a tape-recorded conference between  
17 my client and a person name Tim Gaarn. My client was  
18 unaware he was being recorded by Mr. Gaarn, but this  
19 involves my client's recitation to Mr. Gaarn as to how  
20 he's coaching his son's hockey team, the close  
21 relationship he has with his son, how he's saving money by  
22 coaching the team because he's otherwise able to avoid the  
23 fees associating with having to pay for his son's  
24 membership to be on the hockey team. The point is he's  
25 very close to his children.

1           In another paragraph set forth in the  
2       Government's detention letter it speaks in terms of  
3       transfers from Kenner, accounts or accounts controlled by  
4       Kenner, in the United States, to a corporate account in  
5       Mexico, and that is true, Judge.

6           What the Government's detention letter failed to  
7       tell the Court is those transfers were transfers from an  
8       account controlled by Kenner to a corporate account owned  
9       and controlled by Ken Jowdy because they were in a  
10      business relationship. There's nothing illegal about  
11      those transfers, Judge. That is exactly what it involved.  
12      I respectfully suggest the Federal Bureau Of Investigation  
13      is aware that that was the purpose of those transfers.  
14      Those transfers were not made to set up a resort by which  
15      my client might secrete himself, should be released on  
16      bail pending a speculative criminal prosecution in the  
17      future. Again, Judge, they were related to his  
18      relationship with Ken Jowdy.

19           THE COURT: What about the Government also  
20      asserts he has a personal bank account in Mexico? Are you  
21      contesting that?

22           MR. HALEY: (Counsel confers with defendant.)

23           Judge, what I'm advised is that many years ago  
24      my client did have a personal bank account in Mexico. I'm  
25      advised that it is dormant and hasn't been used in --

1 three to four years, Judge.

2 THE COURT: Okay.

3 MR. HALEY: Judge, I don't know how to respond  
4 when the Government writes to the Court based on these  
5 unidentified sources that he is prepared to pack his  
6 duffle bag with money and head to Australia. It is  
7 untrue. He would leave his family, leave his residence in  
8 Arizona, pack a duffle bag and fly to Australia? And I'll  
9 further demonstrate the absurdity of that claim but it is  
10 untrue.

11 When he writes the defendant has that safe  
12 deposit box, the last time was in 1999 and it was a  
13 jointly held safe deposit box with his ex-wife and  
14 contained things like birth certificates, deed to  
15 residence, things of that nature.

16 I would invite the Government to provide the  
17 Court with evidence beyond that one safe deposit box held  
18 in 1999.

19 The final comment, Judge, I might make when they  
20 speak in their November 13, 2013 detention letter of  
21 access to cash or the expenditure of \$40,000 in cash  
22 within a year preceding his arrest, I would simply state  
23 in response to that, Judge, that upon his arrest the  
24 Government did seize \$15,000 from my client's residence in  
25 cash and as it relates to the \$40,000 in expenditures that

1 year, in September, October and November of 2013, he made  
2 mortgage payments of \$7,000 monthly as relates to the East  
3 Cactus Road address to Wells Fargo Bank. If you subpoena  
4 the records from Wells Fargo Bank I submit they will  
5 reveal he made those deposits in September, October and  
6 November in the amount of \$7,000 per month, that would be  
7 a \$21,000 expenditure.

8 He makes payments of \$800 monthly in truck  
9 payments or at least he did at that time, Judge, which on  
10 a yearly basis would be \$9,600. Those payments are made  
11 directly to Chase Bank. I would respectfully suggest if  
12 the Government subpoenaed those records it would reveal  
13 those payments were made to Chase Bank, about \$1,500 in  
14 average monthly bills consisting of payments for gas,  
15 electric, cable, water, internet service.

16 I will say, Judge, my client does reside at a  
17 residence that is quite large. I'm advised it has  
18 approximately two acres of property. I don't know the  
19 square footage of the home itself but I'm advised it is  
20 rather large.

21 He does or did spend during that period of time,  
22 Judge, \$1,000 monthly for food, clothing, truck, fuel for  
23 his truck, things of that nature. We've exceeded, Judge,  
24 the \$40,000 that the Government claims that were spent  
25 without I guess explanation or to suggest that somehow

1     there is illegal activity underlying expenditure over the  
2     \$40,000. I've recited to the Court the purpose of those  
3     expenditures.

4             Judge, what are some other factors that the  
5     Court should consider in determining determining whether  
6     or not my client truly presents himself as a flight risk?

7             We know this, Judge. We know that he appeared  
8     before the Security and Exchange Commission twice in 2011  
9     to testify in response to an SEC subpoena in an  
10    investigation of his financial activities. He didn't flee  
11    the country then, Judge. Twice, Judge, in 2011.

12            On June 24, 2009, he spoke with Assistant United  
13    States Attorney Julian Moore of the U.S. Attorney's Office  
14    in the Southern District of New York in a joint telephone  
15    call with FBI Agent Mat Galioto who is present in the  
16    Court and SEC Investigator Chris Castano, and the reason  
17    he spoke with them, Judge, at that point in time is  
18    because they had reached out to my client Phillip Kenner  
19    to inquire further of him with respect to an investigation  
20    of Ken Jowdy for what they thought at that time, what they  
21    perceived that time was criminal activity conducted and  
22    perpetrated by Ken Jowdy.

23            About one month later, Judge, he learned that  
24    the investigation being conducted by the grand jury in the  
25    Southern District of New York had turned around and he



25  
1 knew was the target, the subject of the investigation. He  
2 knew this because all of his financial records before  
3 being subpoenaed by the agents assigned to that  
4 investigation, including Agent Galoto. He learned  
5 through Wells Fargo, Bank of America, Charles Schwab, and  
6 Northern Trust and their corporate offices when he  
7 inquired as to the subpoenas. He was advised that he was  
8 being investigated for fraudulent criminal activity, money  
9 laundering, a litany of criminal activity by the federal  
10 government. Judge, that occurred in 2009. Phillip Kenner  
11 was arrested at the gym, I'm told, not far away from his  
12 East Cactus residence in 2013. From 2009 to 2013 there  
13 was an active, vital investigation being conducted of him  
14 by the Federal Bureau of Investigation. He didn't travel  
15 to Australia, he didn't secret himself in Mexico, overseas  
16 or anything of that nature. He did not flee, Judge, armed  
17 with that knowledge.

18 Your Honor, I alluded to civil litigation  
19 currently pending here in the United States of America and  
20 Mexico.

21 The litigation in Mexico involving Ken Jowdy,  
22 there are two civil cases in Arizona, civil litigation  
23 against John Kaiser and Bryan Berard for fraudulent title  
24 transfers involving real estate that was jointly owned by  
25 them during various periods of time. One was filed in

1 2012 in Arizona.

2 I might add, Judge, what is interesting about  
3 that Arizona litigation, three of the John Does, Darryl  
4 Sydor, Tyson Nash, and William Ramford, are intervenors  
5 plaintiffs in that action against John Kaiser.

6 There's also, Judge, pending litigation here in  
7 the state of New York where my client was a plaintiff  
8 against John Kaiser in a disputed real estate matter and  
9 again, Judge, that is in addition to the Arizona case  
10 pending against John Kaiser by my client.

11 He's also, Judge, involved as a defendant in a  
12 lawsuit in Arizona upon a counterclaim filed against him  
13 by Tommy Constantine, his codefendant in this indictment.

14 If my client flees the jurisdiction, Judge, of  
15 of the United States and becomes a fugitive, he's a bright  
16 enough guy to know that he will then have defaulted on all  
17 those causes of action. He will then give us what he  
18 believes to be legitimate claims based upon that  
19 litigation.

20 I also mentioned previously, Judge, that though  
21 he's not directly a plaintiff in the books and records  
22 action, that books and records action is entitled Baja  
23 Ventures 2006, LLC, versus Diamante Cabo San Lucas, and  
24 that's the litigation brought by actually a number of John  
25 Does. And when I say "John Does," I'm referring to the

1 John Does in the indictment, of course, your Honor,  
2 against Diamante Cabo San Lucas particularly because they  
3 are all investors in that company, and they simply want to  
4 know from Ken Jowdy what has happened to their  
5 investments? What is the status of our investments in  
6 Diamante Cabo San Lucas? And Ken Jowdy, having hired  
7 Pepper Hamilton, is resisting through litigation, simply  
8 resisting, simply providing the books and records so they  
9 might determine their interest.

10 My client is an integral and material witness as  
11 relates to that, Judge, because he's the managing member  
12 of Baja Ventures 2006, LLC, and indeed there was a  
13 deposition of him a few weeks ago at the Queensboro  
14 Correctional Facility which I attended, Mr. Harvey was  
15 there, though he's not an attorney of record for Diamante  
16 Cabo San Lucas, but he was there nonetheless to witness  
17 that proceeding on behalf of Ken Jowdy.

18 THE COURT: Let me ask one of the things the  
19 Government proffers. Mr. Kenner arranged for  
20 approximately \$500,000 that was obtained from three of the  
21 victims to pay an American Express card in his former  
22 wife's name.

23 Do you have a response to that?

24 MR. HALEY: We have no idea, Judge, no idea what  
25 the Government is talking about as relates to that

1 allegation. The victim, perhaps the Government could  
2 share the victims they are speaking of. Perhaps we can  
3 see the financial records that reflect those transfers.  
4 Judge, we have no idea how to respond to that because we  
5 have no idea as to the substance of that allegation.

6 THE COURT: How do you respond to the fact that  
7 with respect to the cabal property that they did not agree  
8 to have their money invested in that project? What is  
9 your response to that.

10 MR. HALEY: May I answer your question?

11 THE COURT: You've been going on --

12 MR. HALEY: Judge, there is grand jury testimony  
13 that was actually part of the exhibit, submitted to this  
14 Court in my November 13, 2013 letter.

15 THE COURT: Okay.

16 MR. HALEY: Where Mr. Peca in particular, when  
17 asked that question, testified that he was fully aware  
18 that the investments that were going through Little Isle  
19 IV, LLC were going to be used to provide a loan for  
20 purposes of the investment in the Diamante Cabo San Lucas  
21 property.

22 As a matter of fact, we have arbitration  
23 testimony from Bryan Berard, as well as as John Kaiser  
24 that reflects knowledge of that same fact, Judge.

25 THE COURT: All of the victims knew the money

1 was going to Cabo San Lucas. Is that what your position  
2 is?

3 MR. HALEY: The answer to that is yes, Judge.  
4 All the victims knew that the investment in Diamante Cabo  
5 San Lucas which involved a \$7.5 million loan from Little  
6 Isle IV to Diamante Cabo San Lucas to develop that real  
7 estate, they were all aware of that.

8 Judge, all I might say where the Government says  
9 in the proffer they weren't aware, when you go to the  
10 evidence, when you go to testimony, which is all we have  
11 by way of a Rule 16 discovery at this point in time,  
12 Judge, and ask that very question, they respond they were  
13 aware. As a matter of fact, Judge, as an aside, I'd like  
14 the Court to be cognisant, and I think your Honor is, this  
15 is a unique case. This investigation started in the  
16 Southern District of New York. I surmise, your Honor,  
17 having been a criminal practitioner for over 30 years that  
18 the investigator took its file to the prosecutors in the  
19 Southern District of New York in an effort to convince  
20 testimony to move ahead with an indictment of Phillip  
21 Kenner. I surmise, you know, let's put a few of the  
22 people, a few of the victims in front of the grand jury  
23 before we decide to move ahead with that prosecution.  
24 They did. They put Michael Peca before the grand jury,  
25 they put Darryl Sydor before the grand jury, they put

1 Turner Stevenson before the grand jury. Your Honor, I  
2 have the grand jury testimony of Peca, I would submit, as  
3 an exhibit, to assist the Court, and I can excerpt from  
4 that, I would defy the Government to refute what they  
5 said. Despite the allegations that her signature was  
6 forged on lines of credit, they testified to the contrary.  
7 When asked specifically if they were aware that the money  
8 involved in Little Isle IV was to be used in part to  
9 finance the Cabo San Lucas property, Michael Peca  
10 testified quite clearly, yes, I was aware.

11 So I hope I've answered your Honor's question in  
12 that regard.

13 THE COURT: Can you move to what you are  
14 proposing to the bail package?

15 MR. HALEY: Yes, your Honor.

16 Phillip Kenner does not have the financial  
17 wherewithal to bring in a suretor or to post surety on his  
18 own behalf.

19 By way of contrast, Judge, Tommy Constantine,  
20 the codefendant in this matter, has been released on an  
21 appearance bond as set by the Court which does involve, I  
22 believe, 2.1 million in property, equity in property.  
23 What is interesting when you read the Government's  
24 detention letter, Phillip Kenner is as much as the devil  
25 incarnate as Tommy Constantine is. When you talk about

1 risk of flight, Tommy Constantine has a helicopter's  
2 pilot's license. Tommy Constantine has access to private  
3 jets. Phillip Kenner does not have access to private  
4 jets.

5 So what I'm proposing, Judge, is the following.

6 That the Court set an appearance bond in an  
7 amount the Court deems to be appropriate, unsecured, with  
8 an additional condition that my client abide by all the  
9 conditions as recommended in the pretrial services report  
10 stemming from the District of Arizona which is set forth  
11 on the last page, page 4 of that pretrial services report  
12 with an additional requirement, that his release be  
13 subject to home detention and specifically the home  
14 detention, Judge, at the East Cactus Road residence. That  
15 would give to the extent there is any concern that my  
16 client poses a flight risk, the Court assurance that he  
17 will remain in that residence pending the final  
18 determination of a jury of his peers pending the guilt of  
19 these crimes. Although this is not a factor as set forth  
20 in the matter, I understand that, it would also facilitate  
21 the preparation of trial as relates to this matter in  
22 terms of my ability. With the Court's permission I would  
23 fly out to Arizona, be able to spend a great deal of time  
24 with my client for an extended period of time to prepare  
25 this case for the trial and that would ultimately expedite

1 the date for this trial. That would be my proposal.

2 I'm prepared to make other remarks, your Honor,  
3 but I would defer to the patience this Court has  
4 demonstrated to this matter thus far.

5 Thank you, your Honor.

6 THE COURT: Thank you.

7 Does the Government want to respond briefly?

8 MR. MISKIEWICZ: Yes, your Honor.

9 Your Honor, we said enough regarding how this  
10 shifting of blame to Ken Jowdy is really irrelevant in our  
11 prior submission. Using Ken Jowdy is actually a way of  
12 defrauding the victims twice over in getting them to  
13 invest in a so-called global settlement fund to mount  
14 litigation against against Jowdy because of this Diamante  
15 Cabo San Lucas, and Mr. Haley indicates correctly that  
16 technically the plaintiff in that is a Limited Liability  
17 Company called Baja Ventures 2006, LLC.

18 By way of background the way Baja Ventures  
19 becomes involved in this real estate venture in Mexico, in  
20 Cabo San Lucas is that the defendant borrows 2.5 million  
21 and there are promissory notes provided in Rule 16 from  
22 two of his investor clients in or about 2005.

23 In 2006, this Baja Ventures, LLC is formed and  
24 it buys approximately 39 percent of this project, all of  
25 this with borrowed money.



1 I didn't include every page in my earlier  
2 exhibits, maybe I should include this, but in 2010,  
3 Counsel indicated that all of those trips to Mexico, at  
4 least up until a certain point, and I don't recall how far  
5 back he went, I think 2009, but certainly by 2010 I  
6 suppose what he would say and what he did say, all the  
7 trips to Mexico were related to the litigation, the  
8 litigation being Baja Ventures vs. Diamante Cabo San  
9 Lucas. Well, at page 34 of the deposition of December 15,  
10 2010, this is the debtor's exam of Mr. Kenner. He's  
11 asked, and this was not included, but I can provide the  
12 Court later a copy of the pages.

13 He was asked: I went over his reference to  
14 Guide-Dog, LLC.

15 Ironically on the next page he's asked how about  
16 Baja Ventures? Do you have an ownership interest in Baja  
17 Ventures?

18 Baja Ventures, I don't recognize that.

19 He denies even having an ownership interest in  
20 Baja Ventures, the company he now claims was the only  
21 reason he was traveling to Mexico during this entire  
22 period. He also neglects to say prior to 2009 he owns a  
23 house in the Pedregal section I believe of Cabo San Lucas,  
24 another house purchased without knowledge of one of the  
25 investors after he liquidated his interest in another

1 piece of real estate located in Hermosa Beach, California.

2 THE COURT: Let me ask you to address this.

3 Mr. Haley said he has no idea what the Government's proof  
4 is with respect to the diversion of some of the money the  
5 victims paid to American Express accounts for his ex-wife.  
6 What is that based upon?

7 MR. MISKIEWICZ: That is based on bank  
8 statements and wire transfers. If I can check with the  
9 agents. I'm not sure we have them here.

10 (Counsel confer.)

11 MR. MISKIEWICZ: I can provide the Court  
12 afterwards with the relevant pages of the bank statements  
13 that would show money going from the defendant to his  
14 wife's American Express, your Honor.

15 THE COURT: Okay.

16 MR. MISKIEWICZ: So on December 15th of 2010, he  
17 says he does not know what Baja Ventures is.

18 In the same litigation a few months earlier,  
19 this is page 82 of that, he's asked: What next? What is  
20 Diamante Cabo San Lucas. What is that?

21 That's a Diamante real estate property in Cabo  
22 San Lucas. So he does acknowledge it.

23 Did you ever own that?

24 No.

25 Never owned it?

1 Do you know who did?

2 It's owned by Diamante Cabo San Lucas, and it  
3 goes on. It basically contradicts what he said just a few  
4 months earlier.

5 So the defendant has used a number of people to  
6 blame for the loss of tens of millions of dollars.  
7 Mr. Jowdy is one of those individuals that he's blamed and  
8 he's used to perpetrate the fraud. He is currently  
9 involved in that litigation.

10 There's every reason to believe based on what  
11 we've already alleged or proffered about the creation of  
12 phoney records justifying two million dollars worth of  
13 siphoning of from the global settlement fund to  
14 Constantine, there is every reason to believe if he is  
15 released he will continue to perpetuate the fraud, and  
16 with no bail package, without an ability to even identify  
17 where he lives for sure. He wasn't asked where are you  
18 domiciled versus where do you reside? He was asked where  
19 are you?

20 He was asked do you have interest in certain  
21 companies? And he flatly lied. He lied under oath.

22 There is no reason to take this man's word that  
23 he will not flee or that he will not continue to be a  
24 predator and defraud others.

25 Nothing further.

1 THE COURT: Okay.

2 MR. HALEY: May I respond briefly?

3 THE COURT: Yes.

4 MR. HALEY: Your Honor, let me address the last  
5 remark.

6 It has been my intention here, Judge, to avoid  
7 an evidentiary hearing because the statute does permit  
8 presentation to the Court by way of proffer.

9 For each of the Government's proffer, we have  
10 submitted a proffer in opposition. If the Government now  
11 presents these records that they claim exist from the  
12 victims with respect to a \$500,000 bill, American Express  
13 bill, I understand made on behalf of his wife, I would  
14 like to see those records. I would ask, Judge, if that is  
15 going to be the presentation by the Government, that there  
16 be no determination today because we may very well want an  
17 evidentiary hearing on that issue.

18 Let me also say this, Judge. One of the  
19 conditions, without assuming because again he's entitled  
20 to the presumption of innocence. One of the allegations  
21 the pretrial services recommendations impose, the  
22 defendant shall not maintain any financial account,  
23 personal business related without prior notification and  
24 approval of pretrial services. The defendant shall  
25 provide financial documentation directed by pretrial

1 services.

2 So the Government's argument, if released, the  
3 defendant will continue to commit the financial crimes for  
4 which he's yet to be convicted. I respectfully submit to  
5 the Court that addresses that concern.

6 I've been litigating again for over 30 years.  
7 He was asked a question do you have any ownership interest  
8 in Baja Ventures and he said I have never heard of that  
9 entity and indeed it is not Baja Ventures, it is Baja  
10 Ventures 2006, LLC. I've been in civil litigation where I  
11 don't describe the corporate entity and I get the same  
12 answer, as I should. We're involved in professionalism  
13 where precision is important and they haven't yet done  
14 their homework or they are sloppy in their questioning.  
15 He has not heard of Baja Ventures. He was not asked if he  
16 knew about Baja Ventures 2006. So he has not responded  
17 falsely under oath.

18 I'll rest on the record we've established thus  
19 far.

20 THE COURT: What is your response to the  
21 Guide-Dog LLC, the statements in the sworn testimony that  
22 he has no ownership interest?

23 MR. HALEY: If I may have a moment.

24 The only reason I wasn't prepared for that, is  
25 because Guide-Dog LLC, is the first time I'm hearing of it

1 given the 12 pages of information submitted to the Court  
2 for purposes of a bail detention hearing. I would assume  
3 that if it was that material and salient it would be  
4 rendered initially to the Court, but the Government is  
5 entitled to make that representation. So if I may have a  
6 moment?

7 THE COURT: Sure.

8 (Counsel confers with defendant.)

9 MR. HALEY: Judge, if I may. We could perhaps  
10 litigate this issue for 45 minutes.

11 THE COURT: Don't do that.

12 MR. HALEY: Let's not do that. What I alluded  
13 to, Judge, a myriad of business relationships between my  
14 client and John Kaiser, and indeed they were once business  
15 partners. At the point in time he was asked that  
16 question, he has been in negotiations with John Kaiser to  
17 have John Kaiser assume the ownership interest in  
18 Guide-Dog LLC. Indeed, Judge, if you look at the  
19 financial records, the financial records show that the  
20 money coming into that account was coming from Kaiser's  
21 mother, Ethel Kaiser, and payments were being made to  
22 Kaiser and Berard, Judge.

23 To the extent there was an answer under those  
24 circumstances where the ownership interest was in flux,  
25 and that's what I'm being told by my client, I don't

1 believe that to be an outright material misstatement of  
2 fact in a deposition.

3 Judge, I might add this. I did by way of my  
4 original motion papers to the Court request the  
5 opportunity to call John Kaiser as a witness in this  
6 proceeding. I knew he would be an adverse witness but  
7 from my perspective I had documentation that I could  
8 present him with that would substantiate many of the  
9 claims we are making to this Court as relates to our  
10 proffer. I make the decision not to proceed by way of an  
11 evidentiary hearing and that's where we are today.

12 THE COURT: The Court will place its ruling on  
13 the record.

14 I'll ask the Government to submit the bank  
15 records that relates to the American Express account. I  
16 don't believe there is any reason to hold off from the  
17 decision, so I don't believe that piece of evidence is  
18 dispositive of the bail question, but I think given the  
19 Government's reference to that, Mr. Haley and his client  
20 should have an opportunity to see as well as the Court  
21 what the Government's documentation is with respect to  
22 that.

23 I've carefully considered the factors under the  
24 Bail Reform Act which I'll go through in a moment. It's  
25 my conclusion the Government has met its burden by a

1 preponderance of the evidence. There are no condition or  
2 combination of conditions that would reassure Mr. Kenner's  
3 appearance in court. I'll not reach the issue of  
4 dangerousness. There are allegations regarding  
5 intimidation of witnesses and the Government has made  
6 reference to I guess future economic harm but I don't  
7 believe it is necessary to reach that issue in terms of  
8 the risk of flight by the Court.

9 First with respect to the nature and  
10 circumstance of the offense. The defendant is charged  
11 with a multimillion dollar fraud, an extremely serious  
12 fraud involving a number of victims and is facing a  
13 substantial sentence if he's convicted. The Government  
14 estimates the advisory guideline range to be somewhere  
15 around 168 to 210 months, but I think it is certainly  
16 reasonable to say that if he's convicted he will be facing  
17 a substantial amount of time given the nature of this case  
18 and the nature of the alleged fraud and this creates an  
19 enormous risk of flight given the jail time that he faces  
20 in the case.

21 With respect to the weight of the evidence,  
22 again, I told Mr. Haley and his client a couple weeks ago  
23 that we need to have an evidentiary hearing with respect  
24 to the alleged forged documents because I was willing for  
25 purposes of bail to assume that he could prove those



1 particular documents were not forged.

2           However, the Government has proffered a much  
3 more extensive category of evidence with respect to how  
4 they intended to prove the case with victims' testimony,  
5 not limited to certain victims that defendant wishes to  
6 focus on or certain individuals he wishes to focus on.  
7 The Government has to proffer a more extensive range of  
8 witnesses and documentary evidence, financial records,  
9 e-mails, and other evidence in order to prove the case.  
10 Obviously the grand jury found the evidence the Government  
11 submitted sufficient to indict the defendant under the  
12 probable cause standard and I have not heard, although  
13 Mr. Haley and his client have disputed certain aspects of  
14 the Government's case, I certainly have not heard a  
15 proffer from the defense that leads me to believe the  
16 Government's case here is substantially undermined with  
17 respect to this factor.

18           In light of the extensive proffer the Government  
19 has set forth in its bail letters which includes obviously  
20 this alleged transfer of \$500,000 to pay personal expenses  
21 in an American Express account, among other things. With  
22 respect to the history and characteristics of the  
23 defendant, this militates heavily against bail conditions  
24 being sufficient in this case to reasonably assure his  
25 appearance and I'm not referring to any prior record, I'm

1 referring to his relationship he has certainly in the  
2 country of Mexico. Whether or not the prior travel was in  
3 part for litigation purposes, I think it is certainly  
4 clear he has had business relationships in Mexico  
5 involving property in Mexico. At one point he had a  
6 personal bank account in Mexico so there is no question  
7 that he has ties to Mexico, and although he's obviously a  
8 lifelong U.S. citizen at this point in his life, his ties  
9 to the United States do not appear to me to be very  
10 strong.

11 He's claiming that he has no money available to  
12 him. He's gotten nobody who is willing to even sign a  
13 bond, no one has put up property but to sign a bond, and  
14 despite his proffer to be clear that he has a close  
15 relationship to his wife that will keep him in the United  
16 States, there is no evidence of that given the jail time  
17 he faces in this case. There is no financial ties to the  
18 United States at this point and there appears to be an  
19 insufficient tie or ties to family, friends or otherwise  
20 that would keep him in the United States to face these  
21 extremely serious charges.

22 There's an enormous risk of flight here and as  
23 far as my review of the pretrial services report and the  
24 proffer from the Government with regard to assets and  
25 millions of dollars that is no longer around. I have no

1 assurance whatsoever that I can say there's no reasonable  
2 basis to believe that any conditions that I would set  
3 would reasonably assure his presence in court.

4 With respect to the issue of assets, again, I  
5 want to note that we have a fraud here to have alleged  
6 millions and millions of dollars. Where the money all  
7 went is not clear to the Court.

8 Putting aside to the issue of safe deposit  
9 boxes, and according to the Government's proffer, to  
10 sources that he's prepared to pack his duffle bag with  
11 money and head to Australia or abroad, the Court believes  
12 that given the nature of this fraud, the lack of an  
13 explanation of where that money is, his ties to Mexico,  
14 all of these things in combination, create an enormous  
15 risk of flight that I don't believe can be addressed by  
16 any conditions or combinations of conditions of bail.

17 Although I believe the Government has met its  
18 burden of demonstrating no condition or combination of  
19 conditions can reasonably assure his presence in court, I  
20 would specifically note the bail package that is being  
21 offered is woefully inadequate. To offer it in a case of  
22 this nature, outlining the factors that I just referred,  
23 the enormous risk of flight for a defendant to offer  
24 basically an unsecured appearance bond, means nothing.  
25 The fact that he's signing a bond, if it's unsecured it

1 means absolutely nothing. Although not every defendant I  
2 have has the assets available to them and that  
3 Mr. Constantine had to post, I released defendants who may  
4 not have had financial assets but I had seven or ten  
5 people all willing to sign a bond and put their financial  
6 well being on the line even if they don't have a lot of  
7 property, real property, to have moral suasion over the  
8 defendant he would not leave them with a judgment against  
9 them. We have absolutely none of that here.

10 The bracelet, the Court is well aware of the  
11 weaknesses of an electronic bracelet. If the defendant  
12 would cut off the bracelet and just leave his home, he  
13 would have an enormous amount of forward time to leave his  
14 home. If the defendant wants to leave his home and cut  
15 off the bracelet he would have at minimum a number of  
16 hours of a head start before any government personnel,  
17 before they would be able to determine whether or not  
18 there was a malfunction of the equipment or some other  
19 reason.

20 I don't believe the bracelet would be sufficient  
21 to assure Mr. Kenner would appear in court for his trial.

22 So for those reasons, I'm ordering the defendant  
23 to continue to be detained pending trial.

24 I'm obviously, I think I said this previously,  
25 but I'll repeat it again, and I know this obviously has

1 voluminous documentary records that we've discussed at a  
2 number of conferences, but as soon as Mr. Haley advises  
3 the Court he will appear for trial I'll set this down.

4 I know Mr. Kenner was ready for a year and I'm  
5 anxious to have his case ready to move forward and I'll  
6 resolve any outstanding issues there are with respect to  
7 his access to documents in the jail, but he can be assured  
8 the minute he tells me, Mr. Haley, tell me he's ready to  
9 try this case, it will be set down for trial.

10 So that's the ruling for the Court.

11 I want to spend one minute on the issue with the  
12 computer. I have another case waiting for over a half  
13 hour now but I did get the Government's November 14th  
14 letter. They did have an agent go to the jail to try to  
15 see what could be accessed and what could not be accessed  
16 from that computer. And Mr. Haley, again, I don't want to  
17 spend a lot of time own this now but the bottom line is my  
18 offer to you to resolve this problem continues to be on  
19 the table which is as it appears from the Government 's  
20 letter that Mr. Kenner can access at least portions of the  
21 computer.

22 He's shaking his head no, but --

23 MR. HALEY: Judge, I'm shaking my head yes.

24 THE COURT: No, your client is shaking his head  
25 no, but the Government -- I don't know whether they would

1 let you witness this if it makes everybody feel better. I  
2 would ask the Government to let you go in with them so  
3 they could show you -- and if your client is saying no and  
4 the Government is saying yes that might be the best way to  
5 resolve this. I'm not suggesting that you don't have a  
6 right to have all the access to the computer  
7 mirror-imaged, but at least for a start they said they  
8 provided the e-mails on PDF. Certainly doesn't matter  
9 what computer you use, your client should be able to read  
10 all the e-mails in PDF form. He may want to start doing  
11 that if he's not doing that already.

12 The bottom line is I would ask you, you know, if  
13 you doubt what the Government is saying in this letter for  
14 you to go into the jail and do a physical demonstrative  
15 for you, but ultimately I told you this before and, again,  
16 if you want CJA funds to retain some type of forensic  
17 expert to look at this issue and/or purchase another piece  
18 of equipment that could be used in the jail by Mr. Kenner  
19 to view whatever items can't be reviewed, I'm prepared to  
20 authorize that.

21 MR. HALEY: Your Honor, briefly.

22 THE COURT: Yes.

23 MR. HALEY: I will indeed submit to your Honor a  
24 request to hire a forensic expert for a multitude of  
25 purposes and I will do that, and I thank the Court for

1       that suggestion in that regard.

2               I have some memory of these proceedings. The  
3       very first time we raised the issue with respect to access  
4       of the computer I did mention that he's able to access  
5       some of that information, the most critical or those  
6       e-mails. We provided those e-mails on PDF. There are  
7       thousands and thousands of e-mails in that form. When you  
8       are able to access them directly from the computer you can  
9       look at that particular file and that file will reference  
10      a date, time, if you will, even has a designation so you  
11      immediately have some idea as to the materiality of that  
12      particular file as opposed to thousands and thousands of  
13      e-mails if you go side-by-side.

14             Judge, thank you. I will hire an expert.

15             The matter of the computer, Judge, will be  
16      addressed and I agree that will be my second salvo of the  
17      pretrial motion.

18             THE COURT: What is our next date? I forgot.

19             Do we have another date set?

20             MR. HALEY: Yes, your Honor, December 9th for  
21      status conference, and I think we might be able to then  
22      set an additional pretrial motion schedule.

23             THE COURT: Thank you. Have a good day.

24                     (Proceedings adjourned.)

25